Supreme Court, U. S.
FILED
DEC 28 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1016

ANTHONY GIACALONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

10/4/79

2369 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

RG

TABLE OF CONTENTS

	Page
Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Factual Background	3
Summary of Argument	4
Reasons for Granting the Writ:	
I. The crime herein was essentially local in nature and should have been prosecuted by state authorities. Any interstate aspect was contrived by federal agents.	5
II. Assuming that a federal crime occurred, venue should have been placed in the District of New Jersey where all of the events occurred, and not in the Northern District of New York, which happened to be the residence of the undercover agents.	7
III. Evidence of petitioner's alleged prior involvement in criminal acts which antedated the conspiracy were erroneously received.	8
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Beavers v. Henkel, 194 U.S. 73 7

Brown v. Elliott, 225 U.S. 392 8

Cary v. Curtis, 3 How. 236 (1845) 7

Chisholm v. Georgia, 2 Dall. 419 (1793) 6

General Inv. Co. v. N.Y. Central R.R., 271 U.S. 228 (1926) 6

Haas v. Henkel, 216 U.S. 462 8

Hyde v. United States, 225 U.S. 347 8

Kentucky v. Dennison, 24 How. 66 (1861) 6

Kline v. Burke Constr. Co., 260 U.S. 226 (1922) 7

Muskrat v. United States, 219 U.S. 346 (1911) 6

Salinger v. Loisel, 265 U.S. 224 7

Shelden v. Sill, 8 How. 441 (1850) 7

The Mayor v. Cooper, 6 Wall. 247 (1868) 7

United States v. Archer, 486 F. 2d 670 (2d Cir. 1973) 5, 7

United States v. Arredondo, 6 Pet. 691 (1832) 6

United States v. Beasley, 412 F. Supp. 447 (D.C. Pa. 1975), aff'd, 538 F. 2d 321 (3 Cir. 1976) 7

United States v. Busic, 549 F. 2d 252 (2 Cir. 1977) 8

United States v Rosenberg, 195 F. 2d 583, cert. denied, 344 U.S. 838 (2 Cir. 1952) 7

United States v. Sisson, 399 U.S. 267, 26 L. Ed. 608 (1970) 5

United States v. Smith, 410 F. Supp. 1256 (D.C. Pa. 1976) 7

United States v. Sobell, 142 F. Supp. 575 (S.D.N.Y. 1956), aff'd, 244 F. 2d 520, cert. denied, 355 U.S. 873 (1957) .. 7

Williams v. United States, 289 U.S. 553 (1933) 6

Yakus v. United States, 321 U.S. 414 (1974) 6

Statutes Cited:

18 U.S.C. §§2, 371, 2314, 2315 ..... 1, 2, 3

28 U.S.C. §1254(1) 2

United States Constitution Cited:

Fifth Amendment 3

Sixth Amendment 3

Article III, §2 ..... 3, 6, 7

Contents

Page

Rule Cited:

Federal Rules of Criminal Procedure, Rule 35 7

Other Authority Cited:

Miller, On the Constitution, 314 (1891) 6

APPENDIX

Order Affirming Judgment of Conviction Dated October 4, 1979 ..... 1a

Order Denying Motion for Rehearing Dated November 28, 1979 ..... 3a

In The

Supreme Court of the United States

October Term 1979

No.

ANTHONY GIACALONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT

Petitioner, Anthony Giacalone, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit, to review its affirmance of the judgment of the United States District Court for the Northern District of New York rendered the 20th day of April, 1979, convicting him of violating 18 U.S.C. §§2, 371, 2314 and 2315 (causing stolen goods to be transported in interstate commerce; sale of property stolen from foreign commerce; and conspiracy), after trial before MacMahon and a jury, as a result of which petitioner was sentenced to five years imprisonment.

OPINION BELOW

No opinion was rendered by the court below.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The court below affirmed the judgment of conviction on October 4, 1979, and denied a motion for rehearing on November 28, 1979. The aforesaid orders are annexed as an appendix.

QUESTIONS PRESENTED

1. Whether a larceny which takes place totally within the State of New Jersey can support a conviction under 18 U.S.C. §§2, 371, 2314 and 2315, where the merchandise was delivered there and would not be moved from New Jersey unless and until purchase orders were received, and where the interstate elements of the crime are supplied by federal undercover agents who transport the merchandise from New Jersey to Syracuse?

2. Assuming, *arguendo*, that such facts do state a violation of 18 U.S.C. §§2, 371, 2314 and 2315, whether the indictment could be properly tried in the Northern District of New York, the district to which the agents transported the merchandise, consistent with appellant's constitutional right to be tried in the district in which the crime was allegedly committed?

3. Whether the trial judge properly received into evidence testimony, much of it hearsay, which concerned an alleged conspiracy antedating the indictment?

4. Whether the prosecution was guilty of "district shopping" by contriving to bring this case in the Northern District of New York, when all of the events occurred in New Jersey?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments of the United States Constitution, as well as Article III §2 thereof are involved. In addition, 18 U.S.C. §§2, 371, 2314 and 2315 are also involved.

FACTUAL BACKGROUND

Judge Munsen denied a pretrial motion for a dismissal of the indictment on the grounds of improper venue.

The charges themselves stemmed from the alleged sale of certain stoneware products (Jepcor) which had been reported stolen from a dock in New Jersey. On March 9, 1978, a load of stoneware was delivered to Jepcor's plant in Edison, New Jersey (11).* The container was brought into the warehouse where it was photographed, its doors opened, the customs seals removed, and was then put into a trailer and a pin lock affixed (14-15).

On March 19, 1978, the stoneware was reported stolen (13).

On March 19, 1978, defendant DePasqua, who had pleaded guilty to the charges involved in this indictment (417), placed a telephone call to Special Agent Donald Stenham, whom he believed to be a fence known as "Lucky Cataldo", and offered to sell the stoneware to him for $25,000 (118).

Further telephonic communication between the two ensued (123) and Stenham was told to bring a tractor-trailer to New Jersey, where the merchandise could be picked up (124).

Stenham and Special Agent Richard Dorton, the latter acting in his undercover capacity as "Dick Adams", drove to

---

* Numerals in parentheses refer to pages of the official court reporter's transcript of trial.

New Jersey with the tractor-trailer and met appellant and the other defendants at the Gold Star Diner in Clifton (32-33, 136).

DePasqua handed Stenham a brochure (34, 143). A sample of the stoneware was exhibited and a price discussed (36-37).

The undercover agents were directed to the Martha's Vineyard restaurant, also in Clifton, to await a telephone call confirming the price (39). DePasqua was given the keys to the tractor-trailer (40). They all waited at the restaurant for several hours while the truck was loaded (41).

At about ten o'clock, DePasqua told Dorton to go out and meet the tractor-trailer (42). The price was again discussed — there being a shortage — and Stenham paid DePasqua $20,000 in cash (46-47, 182-184).

DePasqua supplied the agents with the most expeditious route to Syracuse (47, 184) and the agents departed for Syracuse with the tractor-trailer load of stolen stoneware (48, 184).

The merchandise involved was "just sitting in [the] warehouse" (29) as *no* shipping had been received with respect to *any* of the items in the container (28).

SUMMARY OF ARGUMENT

In the present case, all the alleged criminal acts took place in the State of New Jersey. The goods were "just sitting in [the] warehouse" when they were stolen; they were transported to Syracuse by undercover FBI agents. On these facts, appellant urges that the federal offenses were manufactured: the crimes charged are local in nature and should be prosecuted by local law enforcement officials. Moreover, on these facts, the Constitution mandates that the trial be had in New Jersey, where the acts attributed to appellant took place.

During the course of the trial, the court permitted the Government to introduce evidence, much of it hearsay, concerning a conspiracy between the defendant and a co-defendant, which antedated the indictment. This testimony, which was highly prejudicial, should not have been received.

REASONS FOR GRANTING THE WRIT

I.

The crime herein was essentially local in nature and should have been prosecuted by state authorities. Any interstate aspect was contrived by federal agents.

The petitioner had been indicted along with Anthony DePasqua and Matty Vicaro, in a three-count indictment, as aforesaid. Both DePasqua and Vicaro pleaded guilty, and Giacalone was convicted on all three counts.

All of the aspects of the crime herein took place within the State of New Jersey, with the single exception that the undercover FBI agents came from Syracuse, New York.

The fact that these agents said they were transporting the stolen merchandise to Syracuse was not part of the crime allegedly committed by petitioner, since once the stoneware was delivered in New Jersey to the undercover FBI agents, Giacalone's and his co-defendants' participation ceased [*see United States v. Archer,* 486 F. 2d 670, 682 (2 Cir. 1973)].

By way of background, we would ask this Court to review the decision of the United States Supreme Court in *United States v. Sisson,* 399 U.S. 267, 26 L. Ed. 608 (1970).

Judicial power, as defined by Justice Miller in 1891, is the power ". . . of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case

before it for decision . . ." [Miller, *On the Constitution,* 314 (1891)], or, in the words of the U.S. Supreme Court in *Muskrat v. United States,* 219 U.S. 346 (1911), it is the "right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper *jurisdiction.*" (*Ibid.* 361.)

Although the terms "judicial power" and "jurisdiction" are frequently used interchangeably and jurisdiction is defined as the power to hear and determine the subject matter in controversy between parties to a suit [*United States v. Arredondo,* 6 Pet. 691 (1832)], or the "power to entertain the suit, consider the merits and render a binding decision thereon," [*General Inv. Co. v. N.Y. Central R.R.,* 271 U.S. 228, 230 (1926)], the cases and commentaries support and, for that matter, necessitate a distinction between the two concepts.

Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case. [*Williams v. United States,* 289 U.S. 553, 566 (1933); and the dissent of Justice Rutledge in *Yakus v. United States,* 321 U.S. 414, 467-468 (1974).]

The distinction between judicial power and jurisdiction is especially pertinent to the meaning of the words "shall be vested." Whereas all of the judicial power of the United States is vested in the Supreme Court and the lower federal judiciary, neither has ever been vested with all the jurisdiction they are capable of receiving under Article III.

Except for the original jurisdiction of the Supreme Court, which flows directly from the Constitution [*Chisholm v. Georgia,* 2 Dall. 419 (1793); *Kentucky v. Dennison,* 24 How. 66, 98 (1861)], two *prerequisites to jurisdiction* must be present. First, the Constitution must have given the courts the capacity to receive it; and second, an act of Congress must have

conferred it. [*The Mayor v. Cooper,* 6 Wall. 247, 252 (1868); *Cary v. Curtis,* 3 How. 236 (1845); *Shelden v. Sill,* 8 How. 441 (1850); and, *Kline v. Burke Constr. Co.,* 260 U.S. 226 (1922).]

Jurisdiction of the subject matter was timely raised in the case at bar. *See* Rule 35 of the Federal Rules of Criminal Procedure. *See also, United States v. Rosenberg,* 195 F. 2d 583, *cert. denied,* 344 U.S. 838 (2 Cir. 1952); *see* later opinion, *United States v. Sobell,* 142 F. Supp. 575 (S.D.N.Y. 1956), *aff'd,* 244 F. 2d 520, *cert. denied,* 355 U.S. 873 (1957).

The vast increase in the caseload of the federal courts, we submit has in no short measure been due to the fact that the federal prosecutors have been arrogating to themselves jurisdiction over cases that are clearly within the purview of the states and not the federal government. (*See United States v. Archer, supra.*) *See also, United States v. Smith,* 410 F. Supp. 1256, 1258 (D.C. Pa. 1976) and *United States v. Beasley,* 412 F. Supp. 447, 449 (D.C. Pa. 1975), *aff'd,* 538 F. 2d 321 (3 Cir. 1976).

II.

Assuming that a federal crime occurred, venue should have been placed in the District of New Jersey where all of the events occurred, and not in the Northern District of New York, which happened to be the residence of the undercover agents.

Article III §2 of the United States Constitution mandates that a federal trial must be held in the state in which the offense was committed. An accused cannot be tried in one district under an indictment showing that the offense was committed in another (*Salinger v. Loisel,* 265 U.S. 224).

The place where the offense is charged to have been committed determines the location of the trial (*Beavers v. Henkel,* 194 U.S. 73, 83).

Even in a conspiracy case, the accused must be tried where an overt act was performed, which in this case was limited to New Jersey (*Brown v. Elliott,* 225 U.S. 392; *Hyde v. United States,* 225 U.S. 347; and *Haas v. Henkel,* 216 U.S. 462).

See also, United States v. Busic, 549 F. 2d 252 (2 Cir. 1977).

III.

Evidence of petitioner's alleged prior involvement in criminal acts which antedated the conspiracy were erroneously received.

During the trial, the court permitted the Government to introduce evidence concerning a meeting between the undercover agents and a co-defendant which antedated the conspiracy. We maintain this was error, but we leave it to a review of the briefs in the court below, which are incorporated by reference to expand upon this point.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

ORDER AFFIRMING JUDGMENT OF CONVICTION DATED OCTOBER 4, 1979

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of October, one thousand nine hundred and seventy-nine.

Present:

J. EDWARD LUMBARD,
HENRY J. FRIENDLY,
MURRAY I. GURFEIN,

Circuit Judges,

79-1173

UNITED STATES OF AMERICA,

Appellee,

-v-

ANTHONY GIACALONE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of New York.

Order Dated October 4, 1979

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

s/ J. Edward Lumbard
J. EDWARD LUMBARD

s/ Henry J. Friendly
HENRY J. FRIENDLY

s/ Murray I. Gurfein
MURRAY I. GURFEIN

Circuit Judges

ORDER DENYING MOTION FOR REHEARING DATED NOVEMBER 28, 1979

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of November, one thousand nine hundred and seventy-nine.

Present:

HONORABLE MURRAY I. GURFEIN

HONORABLE HENRY J. FRIENDLY

HONORABLE J. EDWARD LUMBARD

Circuit Judges.

79-1173

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY GIACALONE,

Defendant-Appellant.

Order Dated November 28, 1979

A petition for a rehearing having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk